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Fair and Equitable Treatment Between the International and National Rule of Law

Abstract

Promoting the rule of law is a potentially strong legitimating narrative for international investment law. Illustrating the interlinkage, the ubiquitous ‘fair and equitable treatment’ (FET) standard embodies distinctly rule of law requirements. But these requirements remain open-textured and allow understanding their meaning in either more ‘international’ or ‘national’ way. An ‘international’ understanding – detached from the host State’s vision on how the rule of law should look like - should remain dominant. But I argue that decision-making under the FET standard should also involve a systematic engagement with how these requirements would be understood in the host State law and how they were complied with from that perspective. Whilst not determinative for establishing a breach, this assessment better respects the expectations of the parties, strengthens the persuasiveness of findings and helps enhance the national rule of law as a key contributor to the ultimate goal of investment protection - economic development.

Keywords

fair and equitable treatment - international investment law – investor-State dispute settlement - rule of law

1 Introduction

The story of international investment law (IIL) is remarkable in many ways. Arising out of the sometimes-alleged thousands of years of efforts to secure the property and peaceful operation of business people abroad, it has towards the end of the XX century become one of the fastest growing and most controversial spheres of international law. The assessments of the IIL regime and investor-State dispute settlement (ISDS) vary from them being ‘one of the most progressive developments in international law and relations in the history of international law’¹ to conclusions that IIL ‘has ensnared hundreds of countries and put

¹ Stephen M Schwebel, ‘The Outlook for the Continued Vitality, or Lack Thereof, of Investor–State Arbitration’ (2016) 32 *ArbIntl* 1, 1.

corporate profit before human rights and the environment.’² Between and beyond these poles lies the regime’s quest to fully define its role and its value to host States and foreign investors.

In that quest, jurisprudence and literature have given a prominent place to the professed aim of securing the rule of law for foreign investors and promoting it more generally in the host States through enforcing ‘supranational rule of law ... [and] ... uniform standards for acceptable sovereign behavior.’³ This article takes both a descriptive and prescriptive look at the interlinkage between the predominantly used IIL standard of ‘fair and equitable treatment’ and the rule of law. Due to its inherent appeal, the concept of the rule of law has a great legitimating potential for IIL.⁴ In that sense, the jurisprudence-led conceptualisation of the FET standard as containing distinctly rule of law requirements is neither surprising, nor problematic by itself. But IIL jurisprudence and literature also reveal a strong predilection for understanding and applying these requirements in an ‘international’ way that does not necessarily, if at all, take into account what these same requirements would mean in the legal order of the host State in question. This might appear logical in light of the international legal character of the FET standard. But even these ‘distilled’ FET requirements remain considerably vague, which is only augmented by a lack of firm, more detailed ‘international’ reference points as to what they might mean. Where should one turn to find out what (e.g.) ‘transparent’ means in the international context, and as applicable to the operation of domestic administration? The open-textured nature of the used notions risks a somewhat impressionistic ‘I know it when I see it’ way of legal reasoning,⁵ which is concerning in light of the potentially record-setting damages awards that can come as a result.

² Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and the Transnational Institute 2012) 7.

³ David W Rivkin, ‘The Impact of International Arbitration on the Rule of Law’ (2013) 29 *ArbIntl* 327, 328. See also in that sense Benjamin K Guthrie, ‘Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law’ (2012-2013) 45 *NYUJIntlL&Pol* 1151, 1167 and authors cited in Thomas Schultz and Cedric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study’ (2015) 25 *EJIL* 1147, 1164.

⁴ To note, defining ‘legitimacy’ is a complex exercise. For the purposes of this article, it is understood, firstly, in Thomas Franck’s sense of ‘perception of a rule as legitimate by those to whom it is addressed’ in order to secure compliance (Thomas M Franck, ‘Legitimacy in the International System’ (1988) 82 *AJIL* 705, 706). This perception of legitimacy would here come about from what Chris Thomas has termed ‘substantive’ legitimacy (Chris A Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *OJLS* 729, 751). Substantive legitimacy would mean decision-making that is in line with the shared values of those to whom the decision is addressed (*ibid*), this value here being the rule of law.

⁵ See in that sense, and in connection with denial of justice jurisprudence in international law, Andrea K Bjorklund, ‘Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims’ (2005) 45 *VaIntlL* 809, 814.

I put forward a normative argument that for the purposes of establishing a breach of the FET standard the ‘international’ understanding of the rule of law requirements (here dubbed the IROL paradigm) should be thoroughly and systematically complemented in the decision-making process by the ‘national’ rule of law (NROL) paradigm.⁶ This would entail engaging with how the domestic legal order would understand those same requirements, and through assessment to what extent the host State followed its own rule of law ‘vision’ in dealing with the foreign investor. Although this more holistic assessment of domestic legality would not be determinative, nor make national law substantively applicable, it would help remedy the concerns about the legal reasoning process, as well as help realize other benefits in line with the broader goals of IIL. More specifically, there are three main reasons to opt for this complementation.

Firstly, it would help prevent the disconnect between the pre-dispute legal framework that was expected to be primarily relevant for the investment (which is the national one) and the post-dispute (IIL) one. Secondly, it would help enhance the persuasiveness of the legal reasoning process and its findings. Arbitrators’ determinations as to what is (e.g.) ‘due process’ compliant or ‘transparent’ can only benefit from engaging with the pre-existing, usually more detailed and presumably already domestically internalized provisions of municipal law. Finally, persuasively identifying and elucidating the potential rule of law failures (also) from the perspective of the host State’s own legal system, can provide guidance for legislative, policy or practice reform so as to avoid future disputes and allow rule of law enhancement for a broader spectrum of stakeholders. Such improvement can help economic development, and thus realise the ultimate goal of host State participation in the IIL regime.

The article proceed as follows. Section 2 provides a brief overview of the widespread appeal of the concept of the rule of law and its instrumental connection to attracting investment. Section 3 examines the existing link between the IIL regime and the narrative of rule of law promotion, in particular through the ubiquitously present FET standard. Following thereon, section 4 presents the IROL and NROL paradigms as ways of thinking about how the FET-embodied rule of law requirements could be understood and applied, and discusses the current predominance of the IROL paradigm in jurisprudence and literature. Section 5 puts forward the main normative argument of IROL and NROL complementation,

⁶ The arguments put forward do not address the damages determinations (if these become relevant), although rule of law considerations may certainly have impact on quantum as well.

and discusses in more detail the three above-mentioned reasons for it. Finally, section 6 analyses *Dan Cake v Hungary* award⁷ as a feasibility case study that illustrates the thorough engagement with the national legal order in a way that can enhance the domestic rule of law. Section 7 offers some concluding thoughts.

2 The Charmed Concept of the ‘Rule of Law’ and its Instrumental Side

Lawyers, economists and businesspeople all seem united (for once) in their appreciation for the rule of law. Strong rule of law has been consistently considered a key condition for the growth of commerce⁸ and investment,⁹ as well as for economic development in general.¹⁰ While there are some significant caveats,¹¹ the importance of the rule of law for economic development is almost axiomatic in most economic circles, followed closely by the legal ones.¹²

More generally, there is a long history of discussing and promoting the concept of the rule of law (in its somewhat different versions) in common and continental law jurisdictions.¹³ Whilst the definition and content of the notion remain unsettled, its broad appeal is hardly in question – rule of law has been described as a ‘charmed concept, essentially without critics or dissenters.’¹⁴ Various proclamations at the international level illustrate this charm, despite (or

⁷ *Dan Cake (Portugal) S.A. v The Republic of Hungary*, ICSID Case No ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015).

⁸ Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (CUP 2016) 3.

⁹ Guthrie (n 3) 1159 and materials cited in fn 33.

¹⁰ Alvaro Santos, ‘World Bank’s Uses of the “Rule of Law” Promise in Economic Development’ in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 253, 253; Robert C Allen, *Global Economic History – A Very Short Introduction* (OUP 2011) 15.

¹¹ See on caution regarding the measurement problems and actual effects of the rule of law Santos (n 10) 283-85 and N Jansen Calamita, ‘The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions’ in Jeffrey Jowell, J Christopher Thomas and Jan van Zyl Smit (eds), *Rule of Law Symposium 2014* (Singapore Academy of Law 2015) 120-21.

¹² Santos (n 10) 253; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 25; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 2. Empirical economic studies likewise tend to support concrete links between the rule of law and higher economic development, on which see, for example, Dani Rodrik, Arvind Subramanian and Francesco Trebbi, ‘Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development’ (2004) 9 *The Journal of Economic Growth* 131; Daron Acemoglu, Simon Johnson and James A Robinson, ‘Institutions as the Fundamental Cause of Long-Run Growth’ in Philippe Aghion and Steven N Durlauf (eds), *Handbook of Economic Growth*, Volume 1A (Elsevier 2005).

¹³ For an overview, see primarily Tamanaha (n 12). This is not to say that the concept is unknown in other legal families as well. See for example Timur Kuran, ‘The Rule of Law in Islamic Thought and Practice: A Historical Perspective’ in James J Heckman, Robert L Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge 2010) 71-89.

¹⁴ Ian Hurd, ‘The International Rule of Law: Law and the Limit of Politics’ (2014) 28 *Ethics & International Affairs* 39, 39. See similarly for the universal appeal of the concept Arthur Watts, ‘The International Rule of Law’ (1993) 36 *GYIL* 15, 15-16 and Robert McCorquodale, ‘Defining the International Rule of Law: Defying

perhaps because of) a considerable dose of vagueness as to what is exactly meant by the term. States and international organizations profess to spare no efforts in promoting the rule of law at the ‘national and international levels’¹⁵ and reaffirm that ‘respect for and promotion of the rule of law and justice should guide all [States’ and international organizations’] activities and accord predictability and legitimacy to their actions.’¹⁶ Despite recent failures to fully define the concept at the UN level,¹⁷ the underlying common understanding about its desirability persists.

Those same international proclamations sometimes specifically recognise the link between the rule of law and investment attraction. As noted in the 2005 UN World Summit Outcome, there is a need for continuing efforts of developing States and States in transition

to create a domestic environment conducive to attracting investments through, inter alia, achieving a transparent, stable and predictable investment climate with proper contract enforcement and respect for property rights and the rule of law ...¹⁸

The quote above chimes well with a body of literature putting forward the ‘conventional wisdom’¹⁹ that domestic rule of law is essential for attracting foreign direct investments (FDI).²⁰ For example, UNCTAD notes that, for attracting FDI, ‘[t]he creation of participatory, transparent and accountable governance systems that promote and enforce the rule of law is critical [...]’.²¹ Lawyers, including those involved with international investment law, tend to share these sentiments.²² Apart from its intrinsic value as an ‘unqualified human

Gravity?’ (2016) 65 ICLQ 277, 278. See, however, for a description of the consensus as ‘fraudulent’ in light of widespread rule of law defects worldwide Jan Paulsson, ‘Enclaves of Justice’, Miami Law Research Paper Series 2010-29, 1.

¹⁵ See prominently the UNGA Resolution 64/116 - The rule of law at the national and international levels (A/RES/64/116).

¹⁶ UNGA Resolution 67/1 - Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (A/RES/67/1) para 2. See for regional proclamations Helmut P Aust and Georg Nolte, ‘International Law and the Rule of Law at the National Level’ in Michael Zürn, Andre Nollkaemper and Randy Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (CUP 2014) 48, 57.

¹⁷ See on this Nora Arajärvi, ‘The Rule of Law in the 2030 Agenda’ (2018) 10 HJRL 187.

¹⁸ 2005 World Summit Outcome document (A/RES/60/1) para 25 (a).

¹⁹ John Hewko, ‘Foreign Direct Investment: Does the Rule of Law Matter?’, Carnegie Endowment for International Peace Working Paper Number 26, April 2002, 3.

²⁰ See generally for a recent empirical assessment that tends to support the importance of the domestic rule of law British Institute of International and Comparative Law/Hogan Lovells, *Risk and Return: Foreign Direct Investment and the Rule of Law* (BIICL 2015).

²¹ UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (UNCTAD 2008) 150. See similarly earlier UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (UNCTAD 2003) 86.

²² For Jeffrey Jowell, ‘investment will shirk countries which do not honour contracts or property rights, or which tax retrospectively or discriminate or intimidate selected firms or individuals without any hope of recourse’ (‘The Rule of Law: A Practical and Universal Concept’ in Jeffrey Jowell, J Christopher Thomas, Jan van Zyl

good’,²³ the rule of law thus also becomes a more pragmatic tool, a factor of considerable relevance for achieving increased investment flows and the (presumably linked) economic development.

3 IIL and the Rule of Law

3.1. *The Narrative of the Investment Regime as a Rule of Law Enhancer*

In light of the above, it is hardly surprising that the narrative of securing and promoting the rule of law has taken a prominent place in legitimising the existence and operation of the IIL regime. Initially, the existence of strong international investment protection was supposed to be (primarily)²⁴ legitimised through the practical benefits – concluded international investment agreements (hereinafter also IIAs) would directly result in increased FDI.²⁵ States would guarantee protection to foreign investors and set their minds at ease when venturing into a potentially risky environment, bringing their capital with them. As written by Paul Proehl as early as 1960, once a ‘sound and stable way of doing business’ (i.e. a Western one) is secured through investment protection, the ‘great strides’ of investment and economic development can finally happen.²⁶

But empirically demonstrating the link between IIAs and increased foreign investment levels has proved elusive. Without delving deeper into this complex area, it suffices to note that decades of empirical research have failed to provide a consensus.²⁷ Overall, the studies cannot sufficiently persuasively or consistently show the causal link or even correlation

Smit (eds), *Rule of Law Symposium 2014* (Singapore Academy of Law 2015) 3, 9). See similarly Jeswald W Salacuse, ‘Direct Foreign Investment and the Law in Developing Countries’ (2000) 15 ICSID Rev-FILJ 382, 386-87 and 398.

²³ As famously termed by E. P. Thompson in *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books 1975) 266.

²⁴ Another justificatory narrative is the ‘de-politicization’ of disputes that investor-State arbitration allows (see Ibrahim Shihata, ‘Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ (1986) 1 ICSID Rev-FILJ 1). Although still present, this narrative is itself problematic as the true extent of de-politicization between the involved home and host States has been questioned both at the theoretical level (Martins Paparinskis, ‘The Limits of Depoliticisation in Contemporary Investor-State Arbitration’ in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law – Vol.3* (Hart 2012)) and recently also empirically (Geoffrey Gertz, Srividya Jandhyala and Lauge N Skovgaard Poulsen, ‘Legalization, Diplomacy and Development: Do Investment Treaties De-politicize Investment Disputes?’ GEG Working Paper 137, March 2018).

²⁵ See Andrew T Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) 38 VaJIntL 639 for a prominent argument in that vein, coming also from the heyday of intensive 1990s IIA conclusion.

²⁶ Paul O Proehl, ‘Private Investments Abroad’ (1960) 9 JPubL 362, 364.

²⁷ For a recent and comprehensive overview of the research on this topic, see Jason Bonnitche, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) ch 6.

between IIAs and the increased FDI flows.²⁸ Empirical studies finding correlations,²⁹ are countered by those that find no³⁰ or weak correlation,³¹ coupled with studies indicating that IIAs simply form one part of the overall investment attraction environment³² or that specificities of a particular economic sector actually play a more important role in FDI attraction.³³ Increase in the ‘strength’ of IIA provisions also does not seem to be associated with increased investment.³⁴

At the same time, the potential costs of participating in the investment regime are considerable. Adverse investment awards can rip into the ‘social fabric’ of the host State,³⁵ or be economically ‘impossible to bear.’³⁶ How can then the continuing existence of IIL be justified? Focusing on the rule of law, as opposed to FDI number crunching, provides an alternative (and less measurable) avenue. As recently argued by Mavluda Sattorova, both the IIAs and the investor-State arbitration have been increasingly touted as ‘*catalysts* of governance reforms in host States, providing the investment treaty regime with another *raison d’être* and justifying its recent strides.’³⁷ Surveying the literature tends to confirm the strong narrative of IIL’s ‘mission’ to secure the rule of law and/or good governance.³⁸ Investment

²⁸ For a good overview see generally Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009).

²⁹ Eric Neumayer and Laura Spess, ‘Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?’ (2005) 33 *World Development* 1567; Jeswald W Salacuse and Nicholas P Sullivan, ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain’ (2005) 46 *HarvIntLJ* 67.

³⁰ Mary Hallward-Driemeier, ‘Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite’, World Bank Policy Research Paper 3121, 2003.

³¹ Jason W Yackee, ‘Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties’ (2008) *BrookJIntL* 405.

³² UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (UNCTAD 2009) xi-xii; Susan Rose-Ackerman and Jennifer L Tobin, ‘Do BITs Benefit Developing Countries?’ in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (OUP 2009).

³³ Emma Aisbett, ‘Bilateral Investment Treaties and Foreign Direct Investment: Correlation and Causation’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009).

³⁴ Jason W Yackee, ‘Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?’ (2008) 42 *L&Soc’yRev* 805, 807.

³⁵ Stephan W Schill, ‘International Investment Law and Comparative Public Law – An Introduction’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 3, 16.

³⁶ Hélène Ruiz Fabri, ‘Regulating Trade, Investment and Money’ in James Crawford and Marti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 352, 361.

³⁷ Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018) 9.

³⁸ As Van Harten notes, ‘rule of law-based advocacy is widespread in academic, practitioner, policy, and popular literature on investment arbitration’ (Gus Van Harten, ‘Investment Treaty Arbitration, Procedural Fairness and the Rule of Law’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 627, 627 and materials cited therein). See also, among many others, Guthrie (n 3) 1160 (‘BITs are a method of ensuring that foreign investment is treated in accordance with the rule of law’); Bjorklund (n 5) 882; José E Alvarez, ‘“Beware: Boundary Crossings” – A Critical Appraisal of Public Law Approaches to International Investment Law’ (2016) 17 *JWIT* 171, 227 (‘of course, the investment regime is intended to

agreements are ‘necessary’ as the pre-existing legal framework is seen as insufficient - securing the rule of law is thus a primary function of an investment treaty.³⁹

To offer some further illustrations, James Crawford notes that the role of IIL is on occasion not just to reinforce but actually ‘institute’ the rule of law - absence of arbitrary conduct, judicial independence and non-retrospectivity are all ‘standards’ of the rule of law present in IIAs so to potentially discipline a host State.⁴⁰ More generally, the States are required to ‘conform their behaviour to rule of law standards that enable market forces to unfold’⁴¹ and should not be allowed to ‘misregulate’.⁴² As the *ADC v Hungary* tribunal emphasised, ‘while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. ... [T]he rule of law, which includes [IIA] obligations, provides such boundaries.’⁴³

To sum up, the *actual* increase of FDI may prove to be uncertain, but this should be compensated (at least in legitimacy terms) by the role that investment law and ISDS have in securing the universally appealing ideal of the rule of law.⁴⁴ This is, after all, an ideal whose realisation should eventually help attract investments in any case. To be clear, my argument here is not that the recourse to the rule of law is some sort of a concerted justificatory effort by those involved with (or supportive of) IIL so to maintain the regime at any cost.⁴⁵ It is rather a recognition that for a variety of reasons – such as attitudes of arbitrators and counsel,

compel governments to respect the rule of law ...’); and Calamita (n 11) 122; for IIA negotiators espousing such views see Joachim Steffens, ‘Expectations of Governments and Investors vs. Practice: The Government View on BITs’ (2009) 24 ICSID Rev-FILJ 347, 348.

³⁹ Guthrie (n 3) 1166. See similarly Federico Ortino, ‘The Investment Treaty System as Judicial Review’ (2013) 24 AmRevIntlArb 437, 443 (‘the principle of the rule of law [provides] a normative justification for investment treaties’) and Calamita (n 11) 122 (‘a frequently recited aspect ... is that a principal purpose of international investment treaties is to serve as an internationalised substitute for the domestic legal systems of host states in which the place of the rule of law ... may be unreliable or uncertain.’).

⁴⁰ James Crawford, ‘International Law and the Rule of Law’ (2003) 24 AdelLRev 3, 7-8. See similarly Rudolf Dolzer, ‘The Impact of International Investment Treaties on Domestic Administrative Law’ (2004-2005) 37 NYUIntlL&Pol 953, 953-54 and Charles T Kotuby Jr and Luke A Sobota, ‘Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration’ (2013) 28 ICSID Rev-FILJ 454, 454 and 464.

⁴¹ Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 364. See similarly Thomas W Wälde, ‘The Specific Nature of Investment Arbitration’ in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Brill Nijhoff 2007).

⁴² Patrick Carvalho, *Investor-State Arbitration and the Rule of Law: Debunking the Myths* (The Center for Independent Studies 2016) 20.

⁴³ *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 423.

⁴⁴ See for more on this narrative also Sattorova (n 37) 7 and Jason Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (CUP 2014) 43.

⁴⁵ Suggestions that such survival-securing endeavour is at play can be found, for example, in Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 343-45 and Sattorova (n 37) 43-44. Whilst those involved with IIL can certainly be assumed to have an interest in the prolongation of the regime, explaining the focus on the rule of law as being purely oriented towards that interest would not seem to capture all the factors at play.

initially unforeseen jurisprudential developments, and understandings about the teleology of investment protection promoted in the academic writings – the ‘IIL-as-the-rule-of-law-protector’ narrative has become widespread in jurisprudence and theory, sometimes with palpable effects on case outcomes and the employed legal reasoning. As such, this link between investment protection and the rule of law demands close attention in assessing the current and future operation of the regime, its reform, and its legitimacy in the eyes of different actors, with States as the nominal masters of the regime being in that sense particularly prominent.

3.2. The Primary Role of the Fair and Equitable Treatment Standard

The standard of ‘fair and equitable’ treatment has taken a central place in this nexus between the rule of law and IIL. It is described as ‘essentially concerned with the rule of law in international investment protection’,⁴⁶ or as having the rule of law to provide ‘the unifying theory behind [it].’⁴⁷ As much as the wording ‘fair and equitable’ seems to necessarily imply context-specific determinations, the standard ‘[n]evertheless ... includes a number of fundamental principles inherent in the rule of law ...’⁴⁸

What does this mean in practice? In an oft-cited summary, Stephan Schill has identified how jurisprudence disaggregated the standard into seven sub-clusters of requirements, all of which ‘also figure prominently as sub-elements or expressions of the broader concept of the rule of law in domestic legal systems’:

- (1) the requirement of stability, predictability, and consistency of the legal framework;
- (2) the principle of legality;
- (3) the protection of legitimate expectations;
- (4) procedural due process and denial of justice;
- (5) substantive due process and protection against discrimination and arbitrariness;
- (6) transparency; and
- (7) the principle of reasonableness and proportionality.⁴⁹

⁴⁶ Nicolas Angelet, ‘Fair and Equitable Treatment’ in Max Planck Encyclopedia of Public International Law (Online ed.) (March 2011), available at: <http://mpepil.com>, para 5.

⁴⁷ Kenneth J Vandeveld, ‘A Unified Theory of Fair and Equitable Treatment’ (2010-2011) 43 NYUJIntL&Pol 43, 49.

⁴⁸ Peter Behrens, ‘Towards the Constitutionalization of International Investment Protection’ (2007) 45 Arch Völkerrechts 153, 175.

⁴⁹ Stephan W Schill, ‘Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 159-60 and 171. See similarly Behrens (n 48) 175.

Numerous investment awards make more or less explicit, but nevertheless clear references to the embedded rule of law requirements. To stay with Schill's delineation, host States are required to provide stability and consistency,⁵⁰ respect domestic legality,⁵¹ provide procedural due process⁵² and behave transparently.⁵³ These rules of law-oriented refinements of the FET standard have also been codified in some of the more recent investment treaties.⁵⁴

This standard of protection has also taken the centre stage in very practical terms. It is present in the vast majority of existing IIAs,⁵⁵ has emerged as the preeminent basis of claim by foreign investors⁵⁶ and the one bringing most success to them.⁵⁷ The FET standard and its sub-principles are very likely to be a central feature in virtually all existing and prospective investor-State disputes.⁵⁸ It has thus emerged as a core concept of IIL with a potential to reach farthest into the regulatory sphere of States.⁵⁹ Without disregarding the importance of other IIA provisions (primarily the prohibition of uncompensated expropriation), the FET standard is thus a prime candidate for examining the interplay between international investment protection and the rule of law issues.

⁵⁰ Often cited examples are *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) para 274 ('stable legal and business environment is an essential element' of FET), followed almost ad verbatim in *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 124. See similarly *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007) for a description of the unacceptable 'roller-coaster' of legislative changes (in para 250).

⁵¹ An influential early case in that sense was *Gami Investments, Inc. v The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004) para 91 ('a government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation'). Similarly, but more pointing towards potential bad faith *abus de droit* is *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) para 154: host States must use 'the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments' and also *Noble Ventures, Inc. v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) para 178. See also similarly *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001) para 365.

⁵² See for example *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008) for a conclusion that 'a court procedure which does not comply with due process is in breach of the duty [to provide FET]' (para 653).

⁵³ *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 99; *Tecmed v Mexico* (n 51) para 154; *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 309.

⁵⁴ See for example Article 8.10 (2) of the EU-Canada Comprehensive Trade Agreement (CETA), Consolidated CETA Text, published on September 26, 2014 <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed on June 10, 2018.

⁵⁵ Dolzer and Schreuer (n 12) 130 and in particular authors cited in fn 2.

⁵⁶ Bonnitca (n 44) 144; Dolzer and Schreuer (n 12) 130.

⁵⁷ Dolzer and Schreuer (n 12) 98, 101 and 130.

⁵⁸ *ibid* 133-34.

⁵⁹ Dolzer (n 40) 964; Schill 'Fair and Equitable Treatment' (n 49) 151.

3.3. *Everything Good on the Rule of Law Front?*

To take stock so far – the rule of law is generally considered to be a good thing, and specifically so for attracting investment. Investment tribunals have understood and applied the preeminent investment protection standard as requiring the commonly understood rule of law precepts. In sum, one might say, investment tribunals not only claim that they are there to secure the rule of law, but also do it in practice and can derive the legitimacy of their operation therefrom.⁶⁰ Even if increased FDI flows might not always follow, the rule of law ‘mission’ itself can be sufficient to justify the continuation of the regime – especially with States often professing elsewhere their adherence to the rule of law at national and international levels.

But the matters are inevitably more complex. The recourse to the appeal of the rule of law does not provide *carte blanche* to arbitrators, nor does it put ISDS decision-making beyond questioning. The jurisprudence of investment tribunals has helped to distil a remarkably opaque concept such as ‘fair and equitable’ into a series of less opaque, but still very general principles.⁶¹ Requiring that a host State acts ‘consistently’ or ‘transparently’ can offer more guidance than requiring ‘fairness’, but is still far from a rule (as opposed to a principle) and even farther from a case-specific and *ex ante* discoverable order on how State behaviour should have looked like. Rule of law-inspired or not, decisions by investment arbitrators remain contentious and prone to the exercise of considerable level of discretion. To clarify, for the purposes of the present article, the FET standard is understood as conceptually autonomous from the customary international minimum standard of treatment, despite their interlinkages. As much as the customary standard remains relevant for interpreting and applying at least some of the FET requirements,⁶² and sometimes the equality between them is expressly laid out,⁶³ a considerable body of jurisprudence and literature suggests that FET has a life of its own and imposes obligations that go considerably beyond what the customary

⁶⁰ For an example of this narrative see Carvalho (n 42) 25 and more generally Paulsson ‘Enclaves of Justice’ (n 14) 9-12.

⁶¹ See similarly Vandeveld (n 47) 53-54.

⁶² See generally Part II of Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013).

⁶³ As in the North American Free Trade Agreement (NAFTA) Article 1105 and the subsequent NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions (available at http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp, accessed 10 December 2018).

minimum standard embodied.⁶⁴ It is exactly the tendency towards ‘new thinking’⁶⁵ in this sphere that also creates preconditions for the standard to play a more important role in domestic rule of law enhancement.

To be sure, even the refined and disaggregated versions of the autonomously understood FET standard would tend to leave enough flexibility to accommodate for the myriad case-specific factual scenarios that might arise.⁶⁶ It is questionable if much can be different if the standard is expected to deal with immensely diverse (domestic) legal areas.⁶⁷ As argued by Joseph Raz, flexibility is not in itself contrary to the rule of law - it is both inescapable and beneficial if reasonably used.⁶⁸ As in (e.g.) domestic systems of judicial review, there needs to be sufficient discretion so to accommodate the specificities of individual cases.⁶⁹

In normative terms, however, the (perhaps inevitable) acceptance of considerable decision-making discretion should result in the renewed and rigorous focus on how that same discretion is exercised. The employed legal reasoning/argumentative process becomes critical.⁷⁰ As famously observed by Wendell Holmes, ‘general principles do not decide concrete cases’ – much of the key work must be done through case-by-case judgments to specify the abstraction at the point of application.⁷¹

At this point it becomes warranted to have a closer look at what *paradigm* of the rule of law the investment arbitrators are pursuing, most notably in how they approach the task of applying the distilled rule of law precepts, which rules and facts they refer to in the process, and what ultimate goal can be discerned behind the approach taken.⁷² This takes on special

⁶⁴ For a wealth of materials on this, see Paparinskis ‘The International Minimum Standard’ (n 63) 94-95 and in particular fn 254-58; as well as Dolzer and Schreuer (n 12) 130-42.

⁶⁵ ‘[p]ublic international law is inherently [...] not about the rights of individuals against States. The investment treaty framework [...] is [...] a new development which requires new thinking.’ (Daniel Kalderimis, ‘Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice’ in Chester Brown and Kate Miles (eds), *Evolution in International Investment Law and Arbitration* (CUP 2012) 145, 154).

⁶⁶ That is also the reason for common emphasis that ‘a judgment of what is fair and equitable depends on the circumstances of any particular case’ (Angelet (n 46) para 25 and similarly para 4).

⁶⁷ See on this diversity Dolzer and Schreuer (n 12) 288.

⁶⁸ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 222. See also generally Jowell (n 22) 5 and McCorquodale (n 14) 281-82.

⁶⁹ See in particular Peter Cane, *Administrative Law* (4th ed, OUP 2004) 185 and Jeffrey Goldsworthy, ‘Constitutional Interpretation’ in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 689, 693.

⁷⁰ See in that sense Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 64 (‘[i]n law, it is not only (or even primarily) the result that counts, but it is the reason why this result was chosen that matters’). See also Bjorklund (n 5) 871-72.

⁷¹ Cass R Sunstein, ‘Incompletely Theorized Agreements in Constitutional Law’ (2007) 74 *Social Research* 1, 11.

⁷² Paradigm is here thus understood as defined by the Oxford dictionary – ‘A world view underlying the theories and methodology ...’ (<https://en.oxforddictionaries.com/definition/paradigm>). In a similar sense, the concept of paradigms in IIL is present elsewhere, most notably in Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *AJIL* 45, where the investment regime is

relevance as the ‘reason for reasons’ in ISDS awards goes well beyond that in commercial arbitration and must take into account the unique position of investment tribunals.⁷³

Especially in light of the ‘unprecedented responsibility’⁷⁴ of ISDS arbitrators, it is the nature and quality of the reasoning in the award (as opposed to the mere outcome) that will frequently decide its ‘success’ in legitimacy terms.⁷⁵ What should be expected is persuasiveness that goes beyond the rudimentary or formal fulfilment of the requirement for a decision to be ‘reasoned’.⁷⁶ A broad range of interested entities, including both the host State population and those governing them, have a legitimate interest in a decision rendered with sufficiently detailed and persuasive reasoning.⁷⁷ For some authors, facilitating the acceptance of the award by the broader audience becomes the key function of the tribunals’ decision-making.⁷⁸ What could then be the potential paradigms used to provide persuasiveness, garner acceptance and ultimately provide legitimacy to decision-making under the FET standard?

4 International and National Rule of Law Paradigms

4.1. *Two Poles of the Spectrum*

In abstract, it is possible to imagine two opposite paradigmatic approaches to how the rule of law precepts contained in the FET standard should be understood and applied.

At one end of the spectrum is what is here termed the *international rule of law (IROL) paradigm*. At its core, it would mean that each of the FET standard requirements needs to be

examined as potentially dominated by (inter alia) public international law or commercial arbitration paradigms. In the present article, the contrast of international and national rule of law paradigms focuses more narrowly on how specific sub-principles of the FET standard as an emanation of the rule of law are applied and what rule of law ‘world view’ guides such an exercise.

⁷³ Toby Landau, ‘Reasons for Reasons: The Tribunal’s Duty in Investor-State Arbitration’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention*, ICCA Congress Series, Volume 14 (Kluwer Law International 2009); see similarly Kotuby and Sobota (n 40) 455-56.

⁷⁴ Landau (n 73) 188.

⁷⁵ *ibid* 187-88. See similarly Kotuby and Sobota (n 40) 455.

⁷⁶ As required, for example, in Article 48 (3) ICSID Convention and Article 34 (3) UNCITRAL Arbitration Rules 2010. See also on the formal obligation of providing reasons Federico Ortino, ‘Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures’ (2012) 3 JIDS 31, 35-38.

⁷⁷ Landau (n 73) 193-94 and 197. See similarly Benedict Kingsbury and Stephan W Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’, IILJ Working Paper 2009/6, 43-44; Ortino ‘Legal Reasoning’ (n 76) 32; Marta Infantino, ‘International Arbitral Awards’ Reasons: Surveying the State-of-the-Art in Commercial and Investment International Dispute Settlements’ (2014) 5 JIDS 175, 183; Bjorklund (n 5) 869.

⁷⁸ Infantino (n 77) 185; see similarly Guillermo Aguilar Alvarez and W Michael Reisman, ‘How Well are Investment Awards Reasoned?’ in Guillermo Aguilar Alvarez and W Michael Reisman (eds), *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (Martinus Nijhoff 2008) 1, 29 and Ortino ‘Legal Reasoning’ (n 76) 32-33.

understood strictly as an international benchmark, completely and purposefully separate from whatever understandings of these same rule of law requirements might exist in the legal order of the host State in question. Therefore, the tribunals should enforce the *international* rule of law discipline, and should not be obliged to engage with the parallel rule of law concepts existing in the host State – especially as these might well be in some way deficient. The efforts should thus be put towards identifying and applying the specific requirements of, e.g., ‘*internationally-mandated level of consistency*’ or ‘*internationally-mandated due process*’. After all, a global market requires global rules of the game for foreign investors. Of course, it remains open for discussion, and cannot be explored here in detail, whether this would then be a ‘truly’ international understanding or rather an ‘international investment’ understanding of the rule of law. The potential influence of other sources of international law equally binding on the host State remains an important topic in that sense. But for the purposes of this article, however, this is not the key issue. The critical questions is the difference from the other pole of potential understandings as to what the rule of law requirements might mean.

On that other pole is what can be termed the *national rule of law (NROL) paradigm*. At least theoretically, in a particular legal situation which involves the foreign investor, each of the FET standard requirements can have meaning and content imbued by the *national* legal provisions such as constitutional norms, administrative codes, civil and criminal procedure statutes. This, in short, is how the host State in question would understand the meaning of and compliance with the same FET-prescribed rule of law requirements in its own legal order, but without taking the IIA itself into account. In that sense it would be the examination of the ‘*nationally-mandated level of transparency*’ or the ‘*nationally-understood legitimate expectations*’. It is thus a form of negation of the global level playing field. Due process in France will be different from due process in China, despite these and practically all other States agreeing that due process is a key part of the rule of law, and should be obeyed as such.

A further remark is in order. The paradigms introduced above are theoretical models, Weberian ‘ideal-types’ of a particular way of thinking about an issue. They are presented here for analytical and prescriptive purposes, but (as will also be revisited below) are unlikely to be found in pure form in ISDS jurisprudence. But this does not mean that investment arbitrators and academic commentators are not explicitly or implicitly leaning towards a dominance of a particular paradigm. Somewhat unsurprisingly, the IROL paradigm would seem to be dominant in that sense.

4.2. IROL Paradigm as a Logical Fit for the Investment Regime

At first glance it would seem that the IROL paradigm is perhaps the only logical fit for understanding and applying the FET standard requirements. To provide a summary of (interrelated) arguments in that direction, both the applicable law considerations and the underlying idea of detached protection standards point towards the IROL paradigm. Finally, and as hinted above, *international* rule of law promotion is already an important part of the existing IIL narrative.

From the viewpoint of applicable law, there is a broad agreement in practice and theory that in deciding on the host State compliance with the IIA standards, including the FET standard, international law is the governing law. Zachary Douglas, in his rigorous systematisation of applicable laws in ISDS, summarizes thus:

Rule 10: The law applicable to the issue of liability for a claim founded upon an investment treaty obligation is the investment treaty as supplemented by general international law.⁷⁹

Most authors tend to analyse investment arbitration decision-making exclusively through the prism of public international law.⁸⁰ This ‘analytical bias’ tends to stem from the often-stressed quality of investment tribunals as public international law tribunals.⁸¹ This is hardly contentious as a starting point. IIAs are indeed international, State-to-State instruments governed by international law even if the treaty is silent on the applicable law provisions.⁸² If a claim is put forward that a treaty standard was breached, the claim is of an international nature and requires the application of international law,⁸³ and in the first place the text of the IIA itself.⁸⁴ As stated in strongest terms by Prosper Weil:

⁷⁹ Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 39. See in that sense *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) para 74 (‘the *lex causae* [...] based on a breach of the BIT is international law’) and also Ole Spiermann, ‘Applicable Law’ in Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 90, 107. See also generally Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (2nd ed, Kluwer 2017) ch 2.

⁸⁰ Florian Grisel, ‘The Sources of Foreign Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 213, 215.

⁸¹ *ibid* 215 and 222.

⁸² *ADC v Hungary* (n 43) para 290; *LG & E v Argentina* (n 49) para 85; Spiermann (n 79) 107; Cristoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed, CUP 2009) 578.

⁸³ See, above all, Hege E Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (OUP 2013) 128.

⁸⁴ *ibid* 235; Spiermann (n 79) 107. See also in that sense W Michael Reisman and Mahnoush H Arsanjani, ‘Applicable Law under the ICSID Convention: The Tortured History of the Interpretation of Article 42’ in Meg

... no matter how domestic law and international law are combined ... international law always gains the upper hand and ultimately prevails. ... The reference to the domestic law of the host State, even if designed only to ascertain whether it is, or is not, compatible with international law, is indeed a pointless exercise, the sole *raison d'être* of which is to avoid offending the sensibilities of the host State.⁸⁵

The formal superiority of international law points toward an ‘international’ understanding of the FET rule of law requirements. This further accords well with the both explicitly and implicitly expressed idea of investment protection standards serving as detached benchmarks of host State behaviour. What is ultimately the point of international protection if the vagaries of the domestic legal order cannot be avoided?⁸⁶ As Schill notes, ‘[t]hat conduct that is legal under domestic law, suddenly becomes illegal under international law is the most normal of consequences the acceptance of, and submission to, international law by states can have.’⁸⁷ In some ways, achieving the international rule of law while retaining a key role for national legal systems would seem almost as an oxymoron.

The orientation towards the international (sometimes also dubbed supranational) rule of law is also clearly visible from IIL jurisprudence and literature. As noted also in the introduction, David Rivkin asserted with a specific reference to the FET standard that ‘[a]rbitrators have developed a *supranational rule of law* that has helped to create *uniform standards for acceptable sovereign behavior*.’⁸⁸ On the topic of the (common) interplay between IIL and domestic administration, Rudolph Dolzer concludes that the effect of IIL is the (necessary and unavoidable) creation of ‘bubbles’ of separate administrative law for foreign investors. As he notes, the ‘impact [...] on the domestic law of host states remains real; [...] domestic rules applicable to foreign investors must be adjusted to accord with the obligations imposed by the international treaty’⁸⁹ - with the FET standard being one of the provisions with the ‘most severe impact on the domestic legal systems.’⁹⁰ The adjustment of host State behaviour takes form in limiting, defining and narrowing administrative regulations to which foreign

Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2015) 3–11.

⁸⁵ Prosper Weil, ‘The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Menage À Trois’ (2000) 15 ICSID Rev-FILJ 401, 409.

⁸⁶ See in that sense the call for building ‘enclaves of justice’ wherever possible in Paulsson ‘Enclaves of Justice’ (n 14) 9 and 12.

⁸⁷ Stephan W Schill, ‘In Defense of International Investment Law’ (2016) 7 EYIEL 309, 332.

⁸⁸ Rivkin (n 3) 328 (emphasis added).

⁸⁹ Dolzer (n 40) 955 (emphasis added).

⁹⁰ *ibid* 957–58.

investors are to be subjected,⁹¹ and is inherently indifferent to issues relating to the host State nationals.⁹² For other authors, the provisions such as the FET standard aspire to establish a ‘system of international administrative law for foreign investment’⁹³ or a ‘body of international rules of administrative law’.⁹⁴

4.3. Should a ‘Logical Fit’ Entail Exclusivity?

The above does not mean that investment tribunals do not engage with domestic law or that they systematically ignore the domestic legal order. Leaving aside the situations beyond the scope of this article (such as jurisdictional issues of existence of a property right or illegality of an investment),⁹⁵ investment tribunals have also examined and engaged with domestic law in interpreting and applying the FET standard.⁹⁶ However, the extent of this engagement is unequal and there seems to be no clear normative agreement among the tribunals on the role and importance of domestic law.⁹⁷ Jarrod Hepburn notes that:

[...] cases such as *Cargill*, *Sempra*, and *Enron* have explicitly denied the relevance of domestic law at all in FET or arbitrariness analyses. Moreover, many cases involving claims of FET breach have not even addressed the question of the host state’s compliance with domestic law, thus implying that domestic legality is not relevant. However, [...] tribunals in fact do often examine the domestic legality of the respondent state’s conduct. Certainly, domestic legality has not become an outcome-determinative feature in FET analyses [...] [but] consideration of domestic law plays an important contributory role for tribunals attempting to give content to the often nebulous FET standard. [...].⁹⁸

But is this ‘mixed bag’ as concerning the relationship between domestic law and the FET requirements normatively acceptable? The insistence on the IROL paradigm when it comes to applying these requirements can put investment arbitrators in a relatively comfortable

⁹¹ *ibid* 953.

⁹² *ibid* 954.

⁹³ *ibid* 970. See similarly Kalderimis (n 65) 159.

⁹⁴ Dolzer and Schreuer (n 12) 24. See in that sense also the discussion of the relationship with Global Administrative Law in Gus Van Harten and Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17 *EJIL* 121.

⁹⁵ See on these roles for national law above all Monique Sasson (n 79) and also Zachary Douglas, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29 *ICSID Rev-FILJ* 155.

⁹⁶ See, above all, the recent thorough treatment of this issue in Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 13-40.

⁹⁷ *ibid* 14-15 and 17 and materials cited there, in particular *International Thunderbird Gaming Corporation v The United Mexican States*, Separate Opinion of Thomas Wälde (1 December 2005) paras 12 and 33 and *Renta 4 S.V.S.A and others v The Russian Federation*, SCC No 24/2007, Award (20 July 2012) paras 21-23.

⁹⁸ Hepburn (n 96) 39-40 (references omitted). See somewhat similarly regarding expropriation *ibid* 58 and 67-68.

position.⁹⁹ The national law, in decision-making on the merits, is likely to feature only as a fact,¹⁰⁰ leaving the tribunals with a rather free hand in according it the proper level of relevance. Investment arbitrators can thus avoid the potentially complicated discussions of how the host State administration/judiciary/legislature should have acted under national (rule of) law by conveniently falling back on their ‘international’ status – and the most likely rather high level of discretion that accompanies it.¹⁰¹ At the end of the day, it is the international vision of the rule of law, enforced in this case through IIL and ISDS, that is the ultimate arbiter of validity. If a State is unhappy with such a state of affairs, the argument often goes, there is always the prospect of ‘re-calibrating’ the IIAs, offering binding interpretations or, ultimately, exiting the regime.¹⁰²

Such *de lege ferenda* arguments are not the topic nor the normative thrust of this article. Leaving aside attempts at ‘system-external’ reform,¹⁰³ it is the argument made here that while in some situations the legal ‘isolation’ of foreign investors may indeed be necessary to protect them from the vicissitudes of domestic law and practice (and the FET standard allows this) as a more general normative orientation it leaves much to be desired.¹⁰⁴ As argued in the next section, a conscious and thorough balancing between IROL and NROL paradigms – in the IIL as it stands now – is both possible and can lead to tangible legitimacy benefits.

5 Towards the Complementarity of Paradigms

5.1. The General Argument

Put briefly, imposing the international rule of law discipline on host States through the FET standard *should be systematically complemented, to the extent possible, with the NROL paradigm*. There should be a systematic normative orientation of investment arbitrators towards engaging with the relevant national law of the host State in determining not only

⁹⁹ See similarly Bjorklund (n 5) 871 concerning vague requirements for finding a denial of justice and the accompanying discretion of adjudicators.

¹⁰⁰ As noted, the fact-like character of municipal law builds on a long pedigree in international law (Grisel (n 80) 222; see also Spiermann (n 79) 114-15 and Sasson (n 79) 1-7).

¹⁰¹ See in that vein the criticism of the tribunal’s reasoning in *Loewen v US (Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003)) by Bjorklund (n 5) 870.

¹⁰² See generally Charles N Brower and Sadie Blanchard, ‘From “Dealing in Virtue” to “Profiting from Injustice”’: The Case Against Re-Statification of Investment Dispute Settlement’ (2013) 10 TDM.

¹⁰³ ‘System-internal’ would refer to efforts of arbitrators to improve decision-making *de lege lata*, while ‘system-external’ efforts would include *de lege ferenda* reforms by different stakeholders. See similarly Stephan W Schill, ‘The Sixth Path: Reforming Investment Law from Within’ (2014) 11 TDM.

¹⁰⁴ See on this, for example, Hepburn (n 96) 195.

whether the requirement of ‘legality’ was complied with, but rather concerning *all* of the rule of law requirements embodied in the FET standard. In that sense, the tribunal’s discussion of whether the investor was treated in accordance with due process (procedural/substantive), transparently or arbitrarily should in every case, to the extent possible, involve an effort to determine what was the relevant national legal framework concerning these requirements and to what extent it has been complied with. In that sense, the argument I put forward also builds upon what has sometimes been termed ‘sequential review’ in denial of justice cases,¹⁰⁵ but extends it as a more general normative orientation in interpreting and applying the FET standard.

To be clear, the proposed engagement with national law does not mean that this law would become formally applicable nor that this assessment becomes determinative for finding a breach of the FET standard. It certainly remains valid that (as per, among others, Article 27 of the Vienna Convention on the Law of Treaties)¹⁰⁶ national law cannot justify a breach of an international obligation by the host State,¹⁰⁷ nor is the non-compliance with national law *per se* an FET breach.¹⁰⁸ The investment tribunals are also not to become the courts of appeal,¹⁰⁹ and the IROL understanding of the FET standard requirements would thus certainly remain both a starting point and the ultimate fall-back option. But this does not mean that investment arbitrators should not identify, to the best of their power, what the State and its organs were obliged to do under the national ‘vision’ of the rule of law requirements embodied in the standard and how they lived up to these requirements. At the end of the day, there should be a need to persuasively justify why even the fact that national law was followed to the letter is not sufficient to avoid a finding of an FET breach, or to pinpoint the

¹⁰⁵ See in that sense generally Bjorklund (n 5), suggesting that international tribunals should in denial of justice cases first examine the lawfulness of the host State behaviour vis-à-vis its own law, before examining (if necessary) whether domestic law or practice departs from international law obligations.

¹⁰⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

¹⁰⁷ See in the ISDS context Virtus C Igbokwe, ‘Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations’ (2006) 23 JIntlArb 267; Campbell McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention*, ICCA Congress Series, Volume 14 (Kluwer Law International 2009) 114-15 and materials cited therein.

¹⁰⁸ Schill ‘Fair and Equitable Treatment’ (n 49) 163 and 167; Hepburn (n 96) 32-33 and materials cited therein; see also Sasson (n 79) 244 on general inability of domestic legality of an act to affect international (il)legality, but with a call to examine domestic law nevertheless.

¹⁰⁹ The explicit rejection of investment tribunals to play the role of ultimate appeal courts is often reiterated in jurisprudence. See for example *Dan Cake v Hungary* (n 7) para 117; *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB (AF)/97/2, Award (1 November 1999) para 99; *Mr. Franck Charles Arif v Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) paras 440-41. However, for skepticism whether tribunals can really avoid being appellate tribunals at least to some extent, see Bjorklund (n 5) 870.

deficiencies in the framework and/or application of the national law that (further) justify the finding of a breach. Of course, similar persuasiveness in the reverse direction is warranted when no breach is found, in this case the explanation being particularly relevant for the claimant investor.¹¹⁰

What are the main broader reasons for the investment arbitrators to leave their cosy IROL heights and bother with the domestic rule of law considerations? There are three primary ones that I address in the following subsections. Briefly, by doing so, the arbitrators 1) avoid the unacceptable disconnect between the legal framework of investor-State relations *before* and *after* the dispute arose, thereby better respecting the true expectations of the parties; 2) help tackle the vagueness of the FET sub-principles and enhance the persuasiveness of their findings, something particularly important in cases that can result in budget-crippling damages awards; and 3) can help identify, illuminate and hopefully (depending on the host State's proactive attitude) rectify domestic rule of law deficiencies – thus also helping enhance the national rule of law more broadly and potentially benefitting the ultimate goal of domestic economic development.

5.2. Preventing the Disconnect between the Expected Pre- and Post-Dispute Legal Frameworks

The parties involved in an investment endeavour are certainly expected to know the law that will be applied to them, in accordance with the age-old maxim of *ignorantia legis nocet*. However, what law should the parties *primarily* be expected to know? Will an investor primarily consult the IIA on what to expect in legal terms when it comes to interaction with the host State, or rather the domestic laws in different relevant areas? Will the domestic official primarily have a look at the FET provision when confronted with a procedure involving a foreign investor, or the otherwise applicable domestic law?

There are strong reasons to believe that the host States and investors primarily expect and plan that in their broader mutual relationship they will have to comply with domestic law; and that investment agreements – with the FET standard being here particularly prominent - are *not* expected to be the key instruments to secure the rule of law throughout the life of an investment. While duly accounting for potential overgeneralization, these expectations should still be given proper weight by investment tribunals. The tribunals should avoid deciding as if the host States and investors used or should have used the open-textured FET standard as a

¹¹⁰ See also Bjorklund (n 5) 872 on the importance of persuasiveness for (unsuccessful) claimants.

primary (let alone exclusive) guidepost for their behaviour. Such a presumption would not seem to correspond with reality.

Before offering some empirical support for this claim, two remarks are in order. Firstly, from a formal viewpoint, it is true that at least the host State (as an IIA party) is expected to be aware of the existence of the FET standard obligation and its content, so the formal relevance of putting forward the reliance on domestic law is limited. Likewise, in many situations, the both the host State officials and foreign investors are certainly practically aware of these obligations as well.¹¹¹ But this awareness alone detracts little from a suggesting that even in those situations the parties will likely first and foremost strive to comply with domestic law – if for nothing else then because the FET sub-principles are often simply too open-textured to provide tangible guidance. Secondly, expectations discussed here are not the same issue as the operation of the legitimate expectations doctrine, although they certainly affect this issue. What is at play is a broader question of the initial approach to the relevant legal framework in light of the actual or at least presumed expectations of the involved parties. The aim here is to make a more abstract normative point - one that deals with a common scenario where the FET standard protection becomes relevant *ex post facto* only.¹¹²

With that in mind, and although the empirical research is still far from being comprehensive, existing studies suggest that neither investors nor host State appear to ascribe the IIAs the main role in securing the rule of law or guiding their behaviour more generally. For a large number of foreign investors, the knowledge of rules, jurisprudence and even existence of IIL is not *a priori* a given.¹¹³ With the immense variety of foreign investors today, it would be rather optimistic to presume that all will have specialised legal assistance in this area, let alone to such a degree that investment protection becomes a predominant factor in assessing legal and/or political risks. But perhaps even more importantly, even when the knowledge about this protection exists, the belief in its ability to secure the rule of law is far from entrenched.

¹¹¹ See in that sense remarks of Mark Kantor in Ryan J Orr, ‘The Impact of BITs on FDI: Do Investors Now Ignore BITs?’ (2007) 2 TDM, 2.

¹¹² On this *ex post* relevance being common see the remarks of Krishan in Orr (n 111) 6 and also Wälde ‘The Specific Nature of Investment Arbitration’ (n 41) 64.

¹¹³ See Jason W Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ (2011) 51 VaIntlL 397, 427 and particularly fn 125. See also Thomas W Wälde, ‘International Arbitration in Oil, Gas and Energy’ in Lawrence W Newman and Richard D Hill (eds), *Leading Arbitrators’ Guide to International Arbitration* (2nd ed, JurisNet 2008) 749, 758 (‘Investment protection perhaps should be high on the priority of the negotiators and drafters, both in government and with the investor, but it is often not the chief concern’).

For example, a survey of 602 MNCs operating worldwide,¹¹⁴ showed that about a quarter were not influenced by IIAs at all, nearly half saw their importance as limited and only 19% considered that IIAs influence their investment decision to a great extent.¹¹⁵ A more recent British Institute of International and Comparative Law/Hogan Lovells survey of 301 senior executives of multinational corporations focused on their investment decisions, and in particular the role of the rule of law in the process.¹¹⁶ It showed that 95% of respondents felt national laws were ‘essential’ (66% of respondents) or ‘very important’ (29% respondents) in securing rights, property and security. The BITs were still ranked high, but as the survey notes, the ‘intensity of feeling is lower’.¹¹⁷ Only 9% of respondents saw IIAs as ‘essential’.

As concluded, ‘the treatment of investments by a host country’s *national legal system* remain a *key factor* influencing FDI decisions.’¹¹⁸ Many companies invested in relevant markets even without IIAs in force (despite claiming they were ‘essential’)¹¹⁹ and actual research into IIA existence was far from a regular occurrence with determinative results.¹²⁰ Somewhat relatedly, Jason Yackee investigated the attitude towards the IIAs of for-profit business consultants, political risk insurance providers and general counsel of large US corporations.¹²¹ Yackee concluded that evidence suggest that IIAs ‘do not meaningfully influence FDI decisions’,¹²² with responses from 75 general counsels from US Fortune 500 companies indicating a ‘low level of familiarity with [IIAs], a pessimistic view of their ability to protect against adverse host state actions, and a low level of influence over FDI

¹¹⁴ On this survey see in particular Matthew Shinkman, ‘The Investors’ View: Economic Opportunities Versus Political Risks in 2007-11’ in Laza Kekic and Karl P Sauvart (eds), *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (Economist Intelligence Unit/Columbia Program on International Investment 2007).

¹¹⁵ *ibid* 96.

¹¹⁶ BIICL (n 20). See also, however, remarks of Schill in Orr (n 111) 2 and 6-7 and Freya Baetens, ‘Transatlantic Investment Treaty Protection – A Response to Poulsen, Bonnitcha and Yackee’, CEPS Special Report No. 103 / March 2015, 3 on the need for caution in using multinational corporations as proxies for foreign investors generally.

¹¹⁷ BIICL (n 20) 7. See relatedly UNCTAD ‘The Role of International Investment Agreements’ (n 32) 7-9.

¹¹⁸ BIICL (n 20) 10 (emphasis added). Somewhat similar conclusions can also be derived from the survey of 96 CEOs of affiliate firms seated in South Eastern Europe and CIS, where the predominant number confirmed that the enhanced legal environment, and domestic rule of law more broadly, were critical factors for their operation (see UNCTAD ‘The Role of International Investment Agreements’ (n 32) 13-14 for a summary).

¹¹⁹ BIICL (n 20) 10.

¹²⁰ *ibid*.

¹²¹ See Yackee ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment?’ (n 113) 399-400.

¹²² *ibid* 400.

decisions.’¹²³ In light of this, the ubiquitously present FET standard should be not necessarily be viewed as a primary rule of law-treatment guarantee in the eyes of foreign investors.¹²⁴

Nor would the role and importance of investment protection more generally seem to be recognised in (at least some) of the host States. In a recent and most pointed examination of this topic,¹²⁵ based primarily on empirical research in five countries, Mavluda Sattorova concludes that there exists a low awareness concerning investment protection obligations among relevant public officials even after State exposure to ISDS, and a generally low level of ‘learning’ from that exposure. With some limited positive exceptions, ‘the claim that international investment law purportedly transforms governance in host states is belied by the emerging evidence ...’.¹²⁶

IIL thus does not seem to be ‘the’ factor that host State decision makers and foreign investors turn to in their relationship, despite potentially costly consequences.¹²⁷ And this is not necessarily surprising. Both the investor and the host State decision-makers would seemingly be expected to base their assessments of legal risks on the (considerably vague) principles and rules that would be applied in case that: a) there is a dispute; *and* b) that dispute escalates to the costly level of investment arbitration.¹²⁸ It is not only problematic that in practice parties to any venture rarely anticipate that a dispute will arise.¹²⁹ It is also doubtful that more *ex ante* interest and research will be put by an investor into a potentially applicable IIA and accompanying ISDS jurisprudence than into numerous other issues such as the expediency of administration, simplicity of procedures and general effectiveness of courts.¹³⁰ As Hector Mairal poignantly observed, ‘between a government and private parties,

¹²³ *ibid* 429.

¹²⁴ For views that IIAs might be one of relevant factors, but not *the* factor in that sense see also UNCTAD ‘The Role of International Investment Agreements’ (n 32) i-xii; Omar E García-Bolívar, ‘Sovereignty vs. Investment Protection: Back to Calvo?’ (2009) 24 ICSID Rev-FILJ 464, 474 and Baetens (n 116) 2.

¹²⁵ Ch 3 of Sattorova (n 37).

¹²⁶ Sattorova (n 37) 101.

¹²⁷ See generally Wälde ‘International Arbitration in Oil, Gas and Energy’ (n 113).

¹²⁸ See in that sense remarks by several contributors in Orr (n 111) 2 and similarly Peter T Muchlinski, ‘Towards a Coherent International Investment System: Key Issues in the Reform of International Investment Law’ in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (CUP 2013) 411, 438.

¹²⁹ Similarly Michael E Schneider, ‘The Role of the State in Investor-State Arbitration: Introductory Remarks’ in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill Nijhoff 2015) 1, 4 noting that if the investors knew of the likely dispute they would most likely not invest at all. See also the remark of Metalclad owner (of *Metalclad v Mexico* fame), Mr Heller, that he would not have gone to law if he had known the meagre outcome (Orr (n 111) 12).

¹³⁰ See in that sense Salacuse (n 22) 386-87 and also Orr (n 111) 2 and 10.

respect for the expectations that arise from [IIAs] is but the ‘last step’. In international investment cases this ‘last step’ has been taken with great emphasis’.¹³¹

The complementarity of the FET and other provisions of the domestic rule of law processes thus needs to be taken seriously in normative and practical terms. As also recognized in the ICSID Convention preamble,¹³² investment disputes ‘would usually be subject to national legal processes’ – and ISDS is to be seen as appropriate only in some cases.¹³³ Properly understood complementarity is what ought to feature in the legal reasoning process of the tribunals, not in the least if States in ISDS ‘should be presumed to expect and desire an objective and informed review of municipal law’.¹³⁴ This expectation should be followed through. As Campbell McLachlan has noted:

The function of the international law standards enshrined in investment treaties is *not to replace host state law*. Rather it is to provide the fundamental protections of international law, in cases *where the host state legal system has failed to secure such protections itself*.¹³⁵

This last remark feeds well into another reason why thorough and systematic engagement with domestic (rule of) law should be a regular feature in FET decision-making. The rule of law protections already existing domestically, and the often-present richness of national law within which they are situated, should not be ignored in an overly rigid pursuance of a more abstract IROL ideal. They provide a potentially rich well of persuasive findings on (un)acceptability of a certain behaviour from the rule of law viewpoint – viewpoint presumably already internalized by the host State.

5.3. Using the Richness of Domestic Law for a Persuasive Argumentation of Decisions

To persuasively interpret and apply the rule of law requirements embodied in the FET standard, investment tribunals should relate their analysis to host State law. As much as it seems daunting to determine what (e.g.) ‘transparent’ means in the abstract, the task to apply

¹³¹ Hector A Mairal, ‘Legitimate Expectations and Informal Administrative Representations’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 414, 450.

¹³² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Centre for Settlement of Investment Disputes (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

¹³³ See also Schreuer and others (n 82) para 17.

¹³⁴ Paul B Stephan, ‘International Investment Law and Municipal Law: Substitutes or Complements?’ (2014) 9 CMLJ 354, 371.

¹³⁵ McLachlan (n 107) 107 (emphasis added). See similarly on the general submission of foreign investors and investments to national law Sasson (n 79) 7 and 246-47.

such a requirement to concrete facts can be more persuasively grounded by taking into account the domestic provisions.

Determining, for example, what specific transparency requirements host State administrators already faced in the municipal law can offer a fruitful starting point in persuasively shaping the tribunals' ultimate decision. Was there, e.g., a requirement to inform the investor of a particular measure and to solicit its opinion? If there was, how was this followed through, if at all? To reiterate, even a finding that everything (or nothing) was done in accordance with national law might not in the end be determinative. But engaging with a relevant national provision can and should force the tribunal to be explicit in explaining what 'transparent' would mean in a particular case and why, e.g., the fact that everything was done in accordance with domestic law did not prevent a breach. What is this IROL level that domestic legal system has failed to attain, if that is the case? By using domestic provisions and/or practice as a starting point for elaboration, what more would the international rule of law have required, if anything?

This would also be in line with a normative understanding that not 'anything goes' – a principled right for autonomous shaping of the domestic (rule of) law cannot be an excuse for an unhindered *fiat* of the host State.¹³⁶ As has been noted, the interpretation cannot both begin and end with just the domestic law considerations.¹³⁷ There is, however, a strong case for ISDS decision-making to be exercised with caution, rigorousness and judicial 'modesty'.¹³⁸ The focus should thus be on trying to shape, *to the extent possible*, the 'international' intervention in persuasive terms that can be understood and accepted by the host State through relating to its own pre-existing rule of law notions.¹³⁹

Engaging with national law for these argumentative and persuasiveness-enhancing purposes is justified by domestic law's usually and at least nominally higher level of detail and elaboration in comparison to IIL.¹⁴⁰ The richness of national laws for the purposes of

¹³⁶ As noted by Jowell, '[a]cknowledgment that there may be different ways of achieving the rule of law does not, however, lead to the conclusion that the rule of law is an entirely relative and shifting concept and therefore may be readily excused by the standard of national convenience.' ((n 22) 8). See similarly *ADC v Hungary* (n 43) paras 423-24.

¹³⁷ Van Harten (n 38) 632-33.

¹³⁸ See for an appeal for more 'modesty' in ISDS decision making also Santiago Montt S, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2012) 22.

¹³⁹ This also accords with the understanding that host States are more likely to follow the rules which they 'internalized' themselves and thus perceive as legitimate (Moshe Hirsch, 'Compliance with Investment Treaties: When are States More Likely to Breach or Comply with Investment Treaties?' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 865, 873 and materials cited therein).

¹⁴⁰ See in this vein Bjorklund (n 5) 875-78.

arbitral decision-making has been discussed, for example, by Jan Paulsson in an oft-cited piece.¹⁴¹ Paulsson notes that:

[n]ational laws themselves contain corrective norms, and they may be formidable. An international court or tribunal charged with applying a national law has both the duty and the authority to apply it as a whole. If it does so, there may be no need to determine whether international law trumps national law. In this way a confrontation of legal orders is avoided.¹⁴²

In practice, the legal system ‘in the books’ and the written constitution at its summit may be largely unrelated to the everyday exercise of power, as exemplified by what Paulsson calls the ‘lofty eloquence of the constitutions of banana republics of yore’.¹⁴³ But this does not negate the possibility to use these domestic norms to ground the reasoning and enhance acceptability of investment awards. At the end of the day, it allows the arbitrators (in cases so deserving) to show the host State that it failed to abide even by its ‘own’ rules of the game, and that little ground is left for potentially blaming the final outcome on some abstract and hostile IIL ‘imposition’.

Thus where a more detailed and *ex ante* predictable domestic law exists, there is little reason for tribunals to ignore it in their discussions.¹⁴⁴ The FET provisions are certainly not the most developed set of commitments that oblige the host States to respect the rule of law.¹⁴⁵ Combined obligations imposed upon the host State decision-makers beyond the IIAs are almost in every case likely to be more detailed and can often be followed with extensive accompanying jurisprudence and commentary.¹⁴⁶ The promulgated form of domestic rule of law obligations is not usually problematic – as far as ‘law in books’ is concerned, it is hard to find a jurisdiction that does not seem to be strongly committed to the rule of law.¹⁴⁷ It is the

¹⁴¹ Jan Paulsson, ‘Unlawful Laws and the Authority of International Tribunals’ (2008) 23 ICSID Rev-FILJ 215.

¹⁴² *ibid* 215.

¹⁴³ *ibid* 219-20. See similarly Paulsson ‘Enclaves of Justice’ (n 14) 1, on ‘surrealistically gorgeous’ constitutions of dictatorial regimes.

¹⁴⁴ Hepburn (n 96) 56.

¹⁴⁵ As Echandi notes, ‘IIAs rarely include standards of treatment and protection that are not already provided by the host countries’ domestic laws and regulations at the time of the negotiation’ (Roberto Echandi, ‘What Do Developing Countries Expect from the International Investment Regime?’ in Jose E. Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP 2011) 4, 14). On the ‘elusive’ character of trying to establish precise rule of law obligations in international law see Hepburn (n 96) 56 (specifically on due process).

¹⁴⁶ See in that sense Watts (n 14) 16 (arguing that the domestic rule of law notions and mechanisms are far more developed than international ones in any case) as well as Tamanaha (n 12) 118-22 and Bjorklund (n 5) 861 (on the regrettable lack of interaction of investment tribunals with rich resources found in human rights law).

¹⁴⁷ The need for clear laws that are fairly implemented on a consistent and predictable basis is almost universally present (Christopher Stephens, ‘The Rule of Law in Development’ in Jeffrey Jowell, J Christopher Thomas, Jan van Zyl Smit (eds), *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (Singapore Academy of Law 2015) 29, 31). As Carvalho notes, ‘there is nothing in ISDS material

rule of law operation at the ‘most granular level of human affairs’ that is the crucial challenge, not the formal proclamation of the concept’s often supreme status.¹⁴⁸

It is thus normatively questionable if the decision-making process can avoid ‘juxtaposing’ the FET sub-principles with at least some of the crucial commitments that bind the host State decision-makers in parallel. Such decision-making would also allow to temper the considerable normative and analytical problems arising if the investment tribunals must declare what the ‘good’ law should be.¹⁴⁹ As Paul Stephan notes:

[s]uperficially, investment treaties [...] [specify] legal duties that host states have with regard to foreign investors. [...] But all of them refer to the content of municipal law. Each invites a reviewing body [...] to compare the host state’s behaviour to the legitimate expectations that its municipal law created. The enforcement of the international legal duty thus requires a review of municipal law.¹⁵⁰

To return to Paulsson - in the end, the strong engagement with national law results in that ‘the outcome is shown not to be an international imposition on national law, but a vibrant affirmation of that same law.’¹⁵¹ In the long run, in cases of governmental abuses, ‘even citizens of the country whose law is in question may come to see the international tribunal as a defender of enduring national values’.¹⁵² Directly referencing the FET standard, Paulsson concludes that:

[...] one should have faith that a fully and judiciously motivated decision, reached after a painstaking ascertainment of the sources of national law, will be accepted by thoughtful nationals as wholly legitimate. If that is not so, why should one have higher hopes for perceptions of the way an international tribunal applies international norms, like “fair and equitable treatment,” which, in the view of detractors, are nebulous and therefore ultimately arbitrary?¹⁵³

A thorough engagement with the domestic (rule of) law can thus both better respect the pre-dispute expectations of the parties and support the persuasiveness of the findings used to resolve the dispute itself. But the final reason for the normative desirability of such engagement has to do with the post-dispute stage in the host State. Investment arbitrators are in a somewhat unique position to provide the basis for a more permanent national rule of law

protection that is nor covered – or should not be covered – by a civilised society respectful of the rule of law’ ((n 42) 22).

¹⁴⁸ Stephens (n 147) 31. See also Salacuse (n 22) 391-92 and 395-96.

¹⁴⁹ See on this Calamita (n 11) 106 and more generally McCorquodale (n 14) 282.

¹⁵⁰ Stephan (n 134) 358. See somewhat similarly Kotuby and Sobota (n 40) 464.

¹⁵¹ Paulsson ‘Unlawful Laws’ (n 141) 230.

¹⁵² *ibid* 232.

¹⁵³ *ibid*.

enhancement – thus potentially helping attain the ultimate investment protection goal of economic development.

5.4. *Enhancing the National Rule of Law and Helping the Economic Development*

An investment award elucidating the potential rule of law deficiencies in the host State also from the perspective of the national law itself can offer a foundation for pointed domestic reforms.¹⁵⁴ These reforms, in turn, can not only help avoid future disputes, but also allow enhancing the rule of law surrounding for domestic businesses as well. The outcome of this enhancement, according *inter alia* to the economic literature on the topic, can be the realization of the host States' aim of improved economic development.

With their detached position from domestic political pressures, a powerful enforcement mechanism at their disposal, and an increasingly high profile of investment awards which can become focal points of public discussion, investment arbitrators may be uniquely positioned to elucidate the potential flaws and deficiencies in the national (rule of) law, including here laws, policies or practices. A more direct, narrower outcome can be a reform effort tailored towards avoiding future ISDS claims. UNCTAD noted that the increased number of arbitrations, almost always involving the FET standard, may motivate host States to 'improve domestic administrative practices and laws in order to avoid future disputes.'¹⁵⁵ There is also some empirical evidence of certain host States specifically improving their procedures so as to avoid disputes with foreign investors,¹⁵⁶ although more research remains warranted.

But a broader impact can result from the potentially identified rule of law deficiencies being rectified more generally and *pro futuro*. The factual matrix of the FET cases usually involves a legally domestic entity (even if foreign-owned) that is subject to domestic legal framework which is for almost all intents and purposes basically the same as for other domestic entities.¹⁵⁷ It seems unlikely that a tribunal would have to deal with, e.g., separate insolvency,¹⁵⁸ or banking¹⁵⁹ regulation for foreign investors – with the resulting award being relevant *just* for this class of entities within the host State. While the decisions might be for

¹⁵⁴ See in that sense on the potential of awards to increase the 'compliance pull' Bjorklund (n 5) and Paulsson 'Enclaves of Justice' (n 14) 11-12.

¹⁵⁵ UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (UNCTAD 2007) ix.

¹⁵⁶ Sattorova (n 37) 73-84.

¹⁵⁷ See in that sense Jorge E Viñuales, 'Sources of International Investment Law: Conceptual Foundations of Unruly Practices' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 1070, 1074.

¹⁵⁸ As for example in *Dan Cake v Hungary* (n 7) discussed below in section 6.

¹⁵⁹ As for example in *Genin v Estonia* (n 51).

the foreign investors' 'immediate benefit',¹⁶⁰ isolation of ISDS decision from the domestic rule of law issues is hardly possible,¹⁶¹ and the reform and modernization incentives coming out of the awards can often relate to the domestic legal system in general.¹⁶²

This potential reform of rules and practices inspired by the (adequately reasoned) ISDS awards can therefore mean better rule of law for domestic entities as well. On one side, this is desirable due to the self-standing, intrinsic value of improving the rule of law in itself. But also, if the above-discussed presumptions of the improved rule of law leading to enhanced economic development (see section 2) are taken as a starting point, this reform can also help realise the ultimate goal of States in acceding to investment treaties in the first place.

As much as improving the FDI influx can be important, it is ultimately not a value in itself, but a goal towards economic development. As is sometimes noted, '[s]tates seek to attract foreign investments because they are a means to promote, foster and finance the welfare of their people and their development'.¹⁶³ Even if sometimes unarticulated, economic development remains the central rationale behind participating in the IIL regime,¹⁶⁴ and has been 'essential for the efforts to justify the creation of the modern system of investment protection through arbitral tribunals'.¹⁶⁵ As stated in no uncertain terms in the leading ICSID Convention commentary, '[t]he Convention's primary aim is the promotion of economic development.'¹⁶⁶ The purpose of the investment treaties is ultimately host State's prosperity,¹⁶⁷ and IIL should thus 'serve an objective beyond the optimisation of investment flows and profits ...'¹⁶⁸ A number of investment awards also exhibit the understanding that

¹⁶⁰ Ortino 'The Investment Treaty System as Judicial Review' (n 39) 439.

¹⁶¹ David Schneiderman, 'The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and Their Critics' in C.L. Lim (ed), *Alternative Visions of the International Law on Foreign Investment* (CUP 2016) 131, 151. See also August Reinisch, 'The Rule of Law in International Investment Arbitration' in Photini Pazartzis and others (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Hart 2016) 291, 295.

¹⁶² Dolzer (n 40) 971; Peter Muchlinski, Federico Ortino and Christoph Schreuer, 'Preface' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) v, vi-vii; Paulsson 'Enclaves of Justice' (n 14) 9 (on pragmatic focus on incremental lasting changes in a State) and 12 (on actual effects of NAFTA agreement on governance in Mexico).

¹⁶³ García-Bolívar 'Sovereignty vs. Investment Protection' (n 124) 473. See similarly Hepburn (n 96) 64 for whom the objectives of IIL extend to 'encouraging the development of the host state, promoting respect for the rule of law, and increasing general welfare'.

¹⁶⁴ Omar E García-Bolívar, 'Economic Development at the Core of the International Investment Regime' in Chester Brown and Kate Miles (eds), *Evolution in International Investment Law and Arbitration* (CUP 2012) 586, 587.

¹⁶⁵ Jan Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78 MLR 793, 809. See also similarly Landau (n 73) 200-01 and Kingsbury and Schill (n 77) 20-21.

¹⁶⁶ Schreuer and others (n 82) para 11. See similarly García-Bolívar 'Economic Development' (n 164) 590-91.

¹⁶⁷ Ortino 'The Investment Treaty System as Judicial Review' (n 39) 443.

¹⁶⁸ Kleinheisterkamp (n 165) 811; see also Landau (n 73) 201.

foreign investment promotion is not ‘an end in itself’, but rather a stepping stone towards economic growth and development.¹⁶⁹

All opportunities should thus be taken to help realize this ultimate goal. Achieving the rule of law deficiency identification → rectification → enhanced rule of law → improved economic development link can offer a considerable dose of added legitimacy and acceptance of awards that can otherwise be controversial in many ways. Of course, one should be aware of the limits of investment awards as domestic rule of law enhancers, even if investment arbitrators do approach their IROL and NROL complementation tasks seriously. For one, host State need to proactively respond to the identified problems, and readiness and capacity for that is something arbitrators can hardly affect. Secondly, investment disputes are (hopefully) not an everyday occurrence for host States and their overall impact on enhancing the rule of law might be in that sense limited - as opposed to, for example, thousands of cases a State might be facing before the European Court of Human Rights.¹⁷⁰

The acknowledged practical limits do not mean that investment arbitrators should not put their efforts towards the complementation as described above. Recognition of this limits should help provide a more holistic perspective of the involved issues. Yet a different, and perhaps more important, question is how this thorough and systematic engagement might look like in practice? And is it actually feasible in terms of decision-making? To answer this, the following section discussed *Dan Cake v Hungary* award¹⁷¹ as a case study in how IROL and NROL complementation efforts can (and could) work.

6 ‘It Works in Theory...’ – *Dan Cake v Hungary* as A Practical Feasibility Study

Can investment arbitrators be expected to engage with and provide persuasive accounts of domestic legal orders? The question is perhaps best answered by an example from practice, in this case the award in *Dan Cake v Hungary* case. *Dan Cake* award essentially revolves around a procedural due process/denial of justice claim in the FET context, which is in many ways a core rule of law topic. It demonstrates a thorough and persuasive elaboration of the

¹⁶⁹ See for a summary Bonnitche (n 44) 40 and in particular *Saluka v Czech Republic* (n 53) para 300 and *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) para 167.

¹⁷⁰ Certain countries, such as Romania, Russia, Turkey and Italy each face several thousand applications, as visible from the most up-to-date figures (<<https://www.echr.coe.int/Pages/home.aspx?p=reports&c>> accessed 20 June 2018).

¹⁷¹ *Dan Cake v Hungary* (n 7).

domestic legal provisions, judicial practice and accompanying commentary. The Tribunal undisputedly starts and ends at the IROL understanding, and makes it clear that it is not to be seen as an appellate court. But this does not prevent it from providing a persuasive overview of the deficiencies occurring in the behaviour of the domestic court – from the viewpoint of the domestic system itself. This not only persuasively grounds its findings on host State liability but can also provide palpable guidelines for potential rule of law enhancement.

Before examining the award in more detail, it is worth situating it in the broader context of ISDS jurisprudence. *Dan Cake* is not representative of the heterogeneous and daily-growing ISDS jurisprudence as a whole, as it is questionable if any single award serve as that representative. But it is also not an outlier. It is an illustration of a strand of jurisprudence where engagement with the national legal framework has been thorough and in a number of ways along the NROL paradigm complementation lines. To this strand, it is possible to add the examples of awards in *Urbaser v Argentina*¹⁷² and *Al Warraq v Indonesia*¹⁷³ as well as older decisions such as *Maffezini v Spain*,¹⁷⁴ this last one demonstrating a strong engagement with both international and domestic commitments of Spain in the sphere of environmental protection. Different and contrasting examples certainly exist.¹⁷⁵ The variety of approaches under essentially similar FET provisions indicates that opting for the NROL paradigm complementation ultimately remains a normative choice.

6.1 *Dan Cake - The Facts*

The case arose out of the insolvency proceedings instituted against Danesita, a Hungarian confectionery manufacturer predominantly owned by a Portuguese company Dan Cake since 1996.¹⁷⁶ Danesita experienced fluctuating business fortunes, eventually resulting in a request for liquidation by its creditors on 7 August 2006.¹⁷⁷ After Danesita failed to respond to the request in 8 days, its insolvency was presumed in accordance with the Hungarian insolvency law, and liquidation proceedings (including appointment of a liquidator) were put into

¹⁷² *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016).

¹⁷³ *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL Arbitration Rules 1976, Final Award (15 December 2014).

¹⁷⁴ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award (13 November 2000).

¹⁷⁵ See in that sense, for example, the far more cursory assessment of similar rule of law topics as dealt with in *Dan Cake* in *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) paras 764-71, in addition to cases discussed by Hepburn (n 96) 33-34, some of which were already mentioned in section 4.3 above.

¹⁷⁶ *Dan Cake v Hungary* (n 7) para 2.

¹⁷⁷ *ibid* paras 38-39.

motion.¹⁷⁸ An appeal process against this initial decision was unsuccessful on formal grounds.¹⁷⁹

The key events occurred when Danesita attempted to exercise its right to convene a composition meeting of creditors in order to approve an agreement with the debtor.¹⁸⁰ Despite the apparent inclusion of all the necessary documents, the Metropolitan Court of Budapest preliminarily denied Danesita's request as 'in its current form' it was not suitable for distribution to the creditors and the convening of the meeting.¹⁸¹ Danesita was ordered to make several supplementary filings and the liquidator was encouraged to continue with the liquidation process.¹⁸² No appeal against this decision was possible.¹⁸³ For a number of reasons, Danesita found it impossible to comply with the ordered filings and its assets were eventually sold, thus ending the existence of Dan Cake's investment protected under the 1992 Portugal-Hungary BIT.¹⁸⁴

6.2 Tribunal's Analysis and its Potential Impact

While the Dan Cake's claims – based on protection against expropriation, provision of full protection and security, FET and prohibition of unjust and discriminatory measures - were lodged against both the Court's and liquidator's behaviour, the latter's actions were declared as not attributable to Hungary.¹⁸⁵ This put the focus on the decision of the Metropolitan Court to order additional filings. In brief, Dan Cake argued that the court's decision was without legal basis in Hungarian law, as Danesita provided the required documents and the meeting should have thus been convened.¹⁸⁶ The eventual finding of liability resulted from the breach of the FET standard (through denial of justice) and due to a finding of unjust and discriminatory measures.¹⁸⁷ To note, the Portugal-Hungary BIT has no specific provisions on applicable law for the investor-State disputes, and simply provides for arbitration under the ICSID Convention (thus implicating Article 42 of the said Convention).¹⁸⁸ In accordance with the predominant understanding that was discussed in section 4.2 above, the Tribunal was

¹⁷⁸ *ibid* paras 40-41.

¹⁷⁹ *ibid* paras 42-44.

¹⁸⁰ *ibid* paras 46-49.

¹⁸¹ *ibid* para 54.

¹⁸² *ibid*.

¹⁸³ *ibid* para 55.

¹⁸⁴ *ibid* paras 59-62. The text of the BIT can be found at:

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1542>, accessed 12 April 2018.

¹⁸⁵ *ibid* paras 158-60.

¹⁸⁶ *ibid* paras 82-84.

¹⁸⁷ *ibid* paras 146 and 161-62.

¹⁸⁸ See Article 8 of the Portugal-Hungary BIT (n 171). See generally on Article 42 Sasson (n 79) ch 2.

not thus legally mandated to apply domestic law, nor necessarily engage with it in detail. And yet, the key interest here is the manner in which the Tribunal reached its conclusion, in particular the extensive engagement with the Metropolitan Court decision, Hungarian statutes, jurisprudence and academic commentary.

As the Tribunal observed, the prompt convening of the composition meeting, provided all the statutory conditions were met, was of essence for Danesita.¹⁸⁹ In order to ascertain the relevant sources in the domestic legal framework, the Tribunal examined the provisions of the Bankruptcy Act, its commentary and an opinion expressed in the Hungarian case law.¹⁹⁰ In particular, while the Tribunal explicitly refused to pass judgment on the quality of the Hungarian insolvency law *per se*,¹⁹¹ it did discuss the potential justifications and implications of a particular Court practice.¹⁹²

The most important aspect from the rule of law viewpoint is the Tribunals' systematic and rigorous examination of the decision of the Metropolitan court. The Tribunal reiterated the oft-repeated position of ISDS tribunals that they are not to be seen as appellate tribunals, even in situations where the appeal to a particular decision was not possible.¹⁹³ It then opted to examine if the decision was unfair or unequitable by establishing if 'some of the requirements were *obviously unnecessary or impossible to satisfy*, or in *breach of a fundamental right*'¹⁹⁴ and especially bearing in mind the complexity and urgency of the situation which involves the ongoing liquidation proceedings. The paragraphs of the Award that follow show that starting from a specific IROL standard of review is not incompatible with a thorough reasoning process that can strengthen the national rule of law.

The Tribunal began by quoting the decision of the Metropolitan court in its entirety,¹⁹⁵ before again engaging with the Hungarian legislation (including the Civil Procedure Act) jurisprudence and doctrine to establish what sort of discretion the Court might have in ordering the additional documents.¹⁹⁶ After recognizing that the Court might have a power to order additional, non-statutory mandated documents which are truly 'necessary',¹⁹⁷ the key part of the Award then dissects in considerable detail *each* of the 7 requests for filing that have been ordered in the light of their necessity. This is done with references to the legal

¹⁸⁹ *ibid* paras 92-93.

¹⁹⁰ *ibid* paras 94-98.

¹⁹¹ *ibid* para 82.

¹⁹² *ibid* para 97.

¹⁹³ *ibid* para 117.

¹⁹⁴ *ibid* (emphasis in the original).

¹⁹⁵ *ibid* para 99.

¹⁹⁶ *ibid* paras 108-16.

¹⁹⁷ *ibid* paras 113 and 116.

framework, reasonableness and actual commercial and business reality – and with a conclusion that *all* these requests were unnecessary.¹⁹⁸

While it is not warranted within the scope of this article to examine every paragraph, it is illustrative to quote a part of the Tribunal’s reasoning:

If the legislator had meant to grant the Court the power to refuse to convene the composition hearing on the basis of its assessment of the likelihood that the required percentages of favourable votes will be met, it would certainly have said so. On the contrary, it stated that upon the debtor’s request, the Court *shall* convene a composition hearing within 60 days. The *Explanation on insolvency law* makes it clear that “the settlement petition cannot be refused with a view to foreseeable/predictable shortcomings on the merit even if the experienced judge is well aware that the submitted material will not surely be suitable for concluding a composition agreement.” In addition, first, the time between the convening and the hearing may be used to convince some creditors to accept a proposal and second, a composition agreement is not the mere gathering of consents previously given: it involves a process of negotiations during the hearing and a vote at the end of it (see Section 41(5) of the Bankruptcy Act). The Court’s opinion as to the likelihood of success would therefore, at the stage of convening the hearing, be premature.¹⁹⁹

Many similar paragraphs form a persuasive and thorough build-up to a conclusion that ‘the Court simply did not *want*, for whatever reason, to do what was *mandatory*.’²⁰⁰ Such a conclusion led to host State liability for breaching the FET standard and the prohibition of unjust and discriminatory measures, with the damages to be determined subsequently.²⁰¹

The decision makes the deficiencies of the Metropolitan Court’s actions clear, with thorough support by references to different domestic sources. Its reasoning can already provide the guidelines on how to reform the relevant aspects of the legislation and/or practice so to avoid further claims. In the context of the broader rule of law effects, a potential reform is unlikely to be limited just to foreign investors – a modification of the relevant aspects of insolvency law and practice is likely to be applied across the board and to benefit domestic

¹⁹⁸ *ibid* paras 118-42.

¹⁹⁹ *ibid* para 127 (emphasis in the original, references omitted).

²⁰⁰ *ibid* para 142 (emphasis in the original). See similarly in the *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) para 268:

... the obligations and commitments which the Argentine Republic owed ... were not observed. Whether the question is examined from the point of view of the Constitution, the Civil Code or Argentine administrative law, the conclusion is no different. Liability is the consequence of such a breach, and there is no legal excuse under the legislation that could justify the Government’s non-compliance since the very conditions set out by the legislation and the decisions of courts have not been met.

²⁰¹ *Dan Cake v Hungary* (n 7) paras 160-61. As of 10 December 2018, no decision on damages is publicly available.

actors as well. Bearing in mind the importance and frequency of insolvency proceedings generally, this potential enhancement would not be a niche improvement.

7 Conclusion

Securing and promoting the rule of law is a goal that not many would object to in principle. Even less so in the context of foreign investments, where investors might need every assurance they can get before venturing into countries where legal, political and social environments might be in many ways novel and/or volatile. As section 3 discussed in more detail, it is not thus surprising that securing that foreign investors have been treated in accordance with the rule of law has emerged as one of the primary teleological and justificatory narratives in IIL. Nor is it unexpected that the predominantly present and adjudicated standard of fair and equitable treatment has been interpreted and disaggregated to embody distinctly rule of law requirements such as consistency, non-arbitrariness, due process and transparency. But if the principled desirability and legitimacy-enhancing potential of such framing of IIL and the FET standard are less controversial, the devil still lies in the details. Going from ‘fair and equitable’ towards ‘non-arbitrary’ or ‘transparent’ is an important step, but certainly not the one that eliminates ample opportunities for different understandings of what is meant by these notions.

As discussed in section 4, it is possible to distinguish between two paradigms of how to understand and apply the FET-based rule of law requirements. While the ‘international’ (IROL) paradigm, that predominates in the IIL discourse, would suggest an understanding detached from the one in the host State in question so as to preserve the international character and disciplining force of the FET standard, it carries with itself considerable challenges. Not in the least, investment arbitrators dealing with immensely divergent areas of legal regulation are in effect pressed to declare what international law would have to say about rule of law requirements in those context – and there might simply be little or nothing to refer to on the international plane. A discretion-laden effort to apply the said rule of law requirements could therefore end in apparently impressionistic findings that, in legitimacy terms, do not correlate well with their potentially severe financial outcome for the host State.

Section 5 therefore put forward the normative case for complementing the IROL paradigm with an NROL one – the latter being how the FET-mandated requirements would be understood and complied with in the national legal order. Whilst the IROL understanding of

FET requirements would remain the start and end point, with domestic legality most likely not being determinative for establishing a breach, there are distinct benefits to this complementation. If the investment tribunals systematically and thoroughly engage with the domestic legal order and justify their findings also in relation to what extent host State did or did not follow its own ‘vision’ of the rule of law requirements this provides (at least) three concrete benefits. As discussed in more detail in section 5, it would prevent the primary expected pre-dispute legal framework – national one – from potentially becoming almost irrelevant in the substantive decision-making process; it would help enhance the persuasiveness of findings through grounding the findings of arbitrators on what was rule of law-compliant also by having recourse to the usually more detailed and already internalized understandings in the host State; and it would finally offer potential guidelines for rule of law reform, leading towards benefits for both foreign and domestic entities and eventually towards the possibility of enhanced economic development – the ultimate aim of participating in the IIL in the first place.

IIL is a manifestation of a new type of international law that deeply intertwines with the national regulatory spheres. It can affect both the host State government apparatus and the individual entities to a largely unprecedented extent. It should thus require innovative thinking so its power can be harnessed in a way that is most beneficial for the widest range of actors. This article has presented one potential normative path in that direction. Other paths remain possible and worthy of exploration. But what inspired the proposals made here, and should steer the decision making of investment tribunals, is the recognition that ‘it is not too much to say that [...] the role of international law is to reinforce, and on occasions to institute, the rule of law internally.’²⁰² The possibilities for doing so lie open.

²⁰² Crawford (n 40) 8.